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FACILITY FINANCING IN THE 1990s: THE SECOND STEP IN URBAN GROWTH MANAGEMENT

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INTRODUCTION

One of the challenges facing San Diego in the 1990s is finding the best way to finance new public facilities in order to keep pace with the city's rapid rate of development. The availability of effective financing mechanisms to meet the needs of a rapidly growing community rests at the center of the challenge because San Diego is one of the fastest growing metropolitan areas in California.¹ Based on current population figures and forecasts,² growth and continued development appear inevitable.

For at least two years, public attention has centered on fundamental growth and development issues. The question of whether to restrict

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1. Los Angeles Times, June 29, 1988, at 3, col. 6.

2. The population for the San Diego Metropolitan Statistical Area increased 31.4% from 1960 to 1970, 37.1% from 1970 to 1980, 10.9% from 1980 to 1984. U.S. Bureau of the Census. State and Metropolitan Area Data Book 22, 1986 U.S. Government Printing Office; 1986.

development and, if so, what restrictions to impose, was the initial stage of San Diego's growth management policy. Reluctant decisions of the City Council and the voters have permitted growth to proceed at a "natural" pace.³ While public interest in growth and development remains high, however, discussions are now shifting to the second step in the growth management process: the facilities level of service, time of construction and financing.

San Diego operates under a Progress Guide and General Plan (Plan). The City Council has initiated review of the Plan, including the Plan's guidelines for future development.⁴ The refusal of San Diego voters and City Council members to slow the growth rate makes facility financing the primary focus of attention in the guidelines for development. San Diego's growth management policies under the Plan establish the parameters within which to create and judge financing tools of the 1990s.

Planned, well-executed management of city growth is the key to maintaining the quality of life for which San Diego has become famous. Well-articulated growth management policies, followed by financial analyses that assure funding sources and tools to carry out the policies, are essential to success. This Article will explore the San Diego experience in the facility financing area.⁵ Part I reviews San Diego's growth management history as the background for the development of a financing strategy. Part II addresses the limitations on local government revenue raising and spending imposed by the California Constitution. Part III traces the legal standards and court decisions associated with financing tools. Part IV then explores future facility financing tools. The Article concludes that the pressures to create local government-level financing will continue to exacerbate growth management difficulties unless serious state law reform occurs.

3. See *infra* Part I.B. for discussion of voters' rejection of antigrowth propositions.

4. The guidelines include a comprehensive analysis of the problems and issues of growth. The guidelines address how this growth affects the fiscal resources of the City as well as the physical and social pattern of development. The results of this analysis, originally undertaken in 1975, plus the comments and suggestions introduced by individual citizens, property owners and business groups, evolved into a program for managing future development in the City of San Diego. *Progress Guide and General Plan of San Diego, Cal.*, Guidelines for Future Development (approved February 26, 1979).

5. This Article will focus on public improvements for which the City of San Diego has direct responsibility. Therefore, the Article will not include a discussion of financing public schools. In addition, the Article will not contain a discussion of housing exactions.

I. GROWTH MANAGEMENT

A. *Contemporary History*

During the 1960s, growth in the San Diego area rapidly accelerated.⁶ Growth exacted a price. Commuting time and congestion increased, small sewage treatment plants became obsolete, and the city was required to import increasing quantities of water. Schools, fire stations, parks and branch libraries were not ready once new residents moved into their tract homes.

In response to the situation, the San Diego City Council approved the first Progress Guide and General Plan. Voters challenged and rejected the Plan by referendum in 1965. The City Council ultimately approved a weakened version of the General Plan which the electorate ratified in 1967. The 1967 Plan contained a series of principal objectives which formed the basis for the plan and the 1979 growth management program. The objectives included: (1) creation of a strong central core; (2) development of a more compact city; (3) prevention of sprawl; (4) encouragement of greater variety and choice in living environment; (5) promotion of a more handsome environment; (6) recognition of the importance of San Diego's harbor; and (7) preservation of open space systems.⁷

In 1971, a municipal election changed the face of San Diego city government by installing a new mayor and several new City Council members. The new city officials were committed to a change in growth policies, primarily suburban growth and the inadequacies of public facilities in the suburbs. The new Council permitted development only on the condition that a financing plan accompany development of each community plan area. The Council's policy attempted to assure that public facilities and services would be developed concurrently with the need generated by the new homes and jobs. All new facilities were to be funded from revenue flowing from the new community itself, without invading the City's general tax revenue base. This "pay as you grow" philosophy has become the established theme of San Diego's growth management program.

In the mid-1970s, environmentalist groups began lobbying the Coun-

6. San Diego's percentage change in population from 1960 to 1970 was 31.4%. U.S. Bureau of the Census. State and Metropolitan Area Data Bank 22, 1986 U.S. Government Printing Office: 1986.

7. *Progress Guide and General Plan of San Diego, Cal.*, 71-73 (approved July 20, 1967).

cil to adopt growth control legislation. An initiative petition was circulated which proposed limiting San Diego's growth to the City's "fair share of the nation's growth," an amount equal to the national growth rate. The initiative generated insufficient support to place the issue on the ballot. The initiative did, however, focus sufficient attention on the growth problems to induce a commitment from the mayor and council to address the issue in the form of a new General Plan.

The San Diego Growth Management Program was designed to accommodate the City's fair share of the region's natural growth. The program's intended underlying limitation on the City's growth was the availability of public facilities, as financed through the development process. The City's program was solely a residential growth management program, limited to new housing developments. Although the program assumed new commercial and industrial development would carry a share of needed public improvement costs, the Council viewed commercial and industrial development as having no direct impact on the need for schools, parks and libraries.

The program for guiding growth recommended division of the City into three planning areas or tiers: "urbanized," "planned urbanizing" and "future urbanizing." The *urbanized* area includes the central downtown portion of San Diego, as well as some older communities. Land-use and transportation patterns in this tier illustrate the need for an area to function as a regional center. The urbanized tier is designed for diverse land uses; in particular, employment uses such as office, administrative, financial and entertainment uses, as well as nearby residential areas. The urbanized area emphasizes redevelopment and new construction as a way of conserving the social and environmental characteristics of the area and rehabilitating deteriorated neighborhoods.⁸

The second tier identified by the Guidelines for Future Development was the *planned urbanizing* area. It consists of communities where development is already under way but not yet complete. The objective for this tier includes identifying the additional public investment necessary to complete development, as well as calculating for the growth of communities already served by existing capital facilities. Land in this area should be developed in a manner similar to the urbanized tier, through the orderly extension of public facilities and the provision of housing for a variety of income levels.⁹

8. *Progress Guide and General Plan of San Diego, Cal.*, Guidelines for Future Development 17 (approved February 27, 1979).

9. *Id.*

The third tier includes vacant land zoned primarily for agriculture. The undeveloped land is to be held for urban reserve and will be released for development as the planned urbanizing communities expand. The objective of the *future urbanizing* tier is to avoid premature urbanization and to conserve the natural environment and fiscal resources by precluding sprawling development.¹⁰

The Growth Management Program, which focused on the urbanized, planned urbanizing and future urbanizing areas of the City, included development guidelines and goals for each. The City Council incorporated the program into a new Progress Guide and General Plan, to be effective in 1979. A challenge to the legality of the plan and the Growth Management Program was settled out of court without any substantial impact on the plan.

Following adoption of the Progress Guide and General Plan, which incorporated the Guidelines for Future Development, San Diego was confronted with an event which complicated the plan's implementation. In 1978, before the effective date of the Plan, California voters adopted the Jarvis-Gann Property Tax Limitation Initiative (Proposition 13).¹¹ Proposition 13 caused a significant reduction in the City's property tax revenue and made the problem of devising financing programs for newly developing communities and improving public service levels in older communities a far more difficult task.

The City Council responded to Proposition 13 with the Facilities Benefit Assessment (FBA) concept. The concept involves placing special assessments on land planned for development, with the assessments creating a fund for facility improvements and extensions. The City began by adopting an enabling ordinance to exact fees in the planned urbanizing tier. At the same time, the Council prepared plans for public facility financing in the urbanizing tier. The process required review and update of many community plans and a detailed inventory of the public facilities needed to serve the planned new growth.

The FBA approach to public facilities financing was novel in California in the late 1970s. Upon the advice of the city attorney, the City commenced an action to validate the procedure. The appellate courts approved it in the summer of 1984, in *J.W. Jones Companies v. City of*

10. *Id.*

11. CAL. CONST. art. XIII A (West 1990). For discussion of Proposition 13, see *infra* Part II.A.

*San Diego*¹² and *City of San Diego v. Holodnak*.¹³ Both decisions are frequently cited in California and nationally with regard to financing and managing growth costs in developing urban and suburban areas.¹⁴

In 1984, the Growth Management Review Task Force began evaluating the first five years of the City's experience with the 1979 Progress Guide and General Plan and the various implementation policies, ordinances and regulations that had been adopted pursuant to the Plan. The task force concluded that community plans could accommodate projected growth until the year 2000,¹⁵ when it would be necessary to open more land for development. The task force also found that public facility financing mechanisms used in planned urbanizing areas were reasonably equitable and provided adequate service levels to accommodate development.¹⁶ In the urbanized areas, however, the task force concluded that services and facilities had not kept pace with growth and did not meet General Plan standards.¹⁷

Unfortunately, the task force report was overshadowed in September 1984, when a divided City Council approved the shift of 5,100 acres located in the northern portion of the City from future urbanizing to planned urbanizing. The target of the shift was a ninety-one acre project in La Jolla Valley. The approval of the shift caused a voter initiative effort, Proposition A, to overturn the Council's decision and prohibit other phase shifts without voter approval. Although vigorously opposed, Proposition A was adopted by the electorate in November 1985.¹⁸ Voter approval of this stringent measure sent a clear message to the City Council that growth management has a high public priority.

12. 157 Cal. App. 3d 745, 203 Cal. Rptr. 580 (1984).

13. 157 Cal. App. 3d 759, 203 Cal. Rptr. 797 (1984).

14. See *infra* Part III.B.4. for a detailed discussion of the FBA and the cases upholding the concept.

15. Growth Management Review Task Force of San Diego, Cal., *Task Force Report to the City Council 4* (Dec. 1984).

16. *Id.*

17. *Id.*

18. Amendment to Progress Guide and General Plan of San Diego, Cal. (approved November 5, 1985). Proposition A's validity was challenged in a lawsuit filed by the La Jolla Valley landowners, later voluntarily dismissed without prejudice.

B. Current Policies on Growth Management: The Shift to Financing

In January 1987, the City Council approved a program to reevaluate the City's growth management policies and update the City's Progress Guide and General Plan. The objective was to formulate a new strategy for the City's next twenty years. To assist in the effort, the Mayor and City Council appointed a Citizens Advisory Committee for Growth and Development, comprised of representatives from the business sector, community plan areas, the development industry and environmental groups, as well as educators and interested citizens.

The Citizens Advisory Committee's goal was to maintain the status quo and moderate the rapid rate of development while a period of study and analysis occurred. Pursuant to the City's police power authority,¹⁹ the City instituted a control mechanism to prevent a rush of development that might frustrate the ultimate policies established pursuant to General Plan revisions. Following lengthy and heated public hearings, the City Council in 1987 introduced and adopted the Interim Development Control Ordinance (IDO).²⁰

As adopted, the IDO applied to all areas of the city: urbanized, planned urbanizing and future urbanizing. Narrower in scope than the three tiers in the General Plan, the IDO focused solely upon residential development²¹ and imposed a limit of 8,000 dwelling units per year in San Diego. This annual number was then allocated to individual community plan areas.²²

While the IDO moderated the rate of development, work continued on what was hoped would be a permanent solution. The 1988 General Election contained three measures on the ballot, sponsored by three different public and private organizations, directly relating to growth management.

One measure, Proposition H, was placed on the ballot by the City Council and would have amended the Progress Guide and General Plan by adding a growth management element. The specific question presented to the voters was:

Shall the City adopt a Growth Management Element which:

19. CAL. CONST. art. XI, § 3 (Deering 1981); SAN DIEGO CITY CHARTER art. I, § 2 (1931).

20. SAN DIEGO, CAL., AMENDED ORDINANCES No. O-17015 (1988).

21. *Id.* at § 3.

22. *Id.* at § 4 and Schedule 4.

a. Establishes a maximum limit for the next five years of 3,600 new residential units per year, and 3,990 previously approved residential units per year;

b. Protects single-family neighborhoods by restricting new development;

c. Preserves environmentally sensitive lands, including wetlands, floodplains, steep slopes, biologically sensitive lands and significant prehistoric and historic sites;

d. Requires that traffic generated by new development stay within roadway capacity;

e. Strengthens community plans by requiring periodic comprehensive updates and limiting amendments between updates;

f. Requires there be adequate public facilities and services at the time of development; and

g. Establishes regional goals for air quality, water, sewage treatment, solid waste disposal and transportation?

The second group, Citizens for Limited Growth, prepared Proposition J, which asked the voters:

Until standards as designated in the initiative are met, shall the City:

a. Limit residential dwelling units as follows:

FY 1988-89: 7,000 to 9,000 dwelling units

FY 1989-90: 6,000 to 8,000 dwelling units

FY 1990-91: 5,000 to 7,000 dwelling units

FY 1991-92 and each subsequent fiscal year through the

FY 2009-

2010: 4,000 to 6,000 dwelling units;

b. Develop and implement a plan for industrial and commercial development consistent with the criteria in the initiative;

c. Develop and implement an allocation system for residential development as provided in the initiative;

d. Preserve sensitive environmental lands as provided in the initiative;

e. Adopt a plan for the ultimate development of the City's sphere of influence as provided in the initiative?

Finally, the San Diego County Board of Supervisors placed an advisory vote, Proposition C, before the electorate which asked: "Should the Regional Planning and Growth Control Measure be adopted?" Proposition C attempted to demonstrate public support for the idea that certain impacts associated with growth should be resolved on a regional basis. It proposed the establishment of a Regional Planning

and Growth Management Review Board, which would formulate a regional growth management plan to deal with transportation management, solid waste disposal, water reclamation, sewage disposal, air quality and growth inducing industrial zoning. Each city within the San Diego region and San Diego County²³ would participate in the formulation of, and would comply with, the adopted regional growth management plan.

Propositions H and J failed to receive a majority vote while Proposition C passed by sixty percent. Consensus analysis of the election results told legislators that the voters favored a regional approach to growth management without caps on the amount of residential construction permitted annually.

Confronted only with the passage of an advisory measure, the City Council faced a difficult decision in what components of Proposition H to implement. Whether to proceed with all or a portion of the growth management program contained in Proposition H became a difficult and time consuming process. Although the Growth Management Element, Proposition H, did not receive a majority vote, the City Council recognized that the voters desired responsible, well-executed management of growth and development. The Council decided to implement many of the recommendations incorporated in the proposed growth management element. The growth management program ultimately adopted by the City Council directed the City Manager and Planning Director to proceed with implementation of a variety of actions which focus on neighborhood preservation, environmentally sensitive lands public facilities and transportation.

The goal of neighborhood preservation had many components but focused on the Single Family Neighborhood Protection Ordinance, enacted by the City Council at the same time that Proposition H was placed on the ballot. The legislation acknowledged that there are residences in the City which are primarily single-family in character, but which are zoned for multi-family residential uses. Increasingly, single-family neighborhoods in multi-family zoned areas are being converted to multi-family and nonresidential uses.

The Council apparently decided that continued multi-family and nonresidential development at densities permitted by the existing zoning would threaten the character of existing single-family neighborhoods. Using the ordinance, the City sought to identify all

23. The County of San Diego includes 18 incorporated cities plus unincorporated areas.

neighborhoods to be protected by single-family zoning under a program designated "Protected Single-Family Neighborhoods." During post-election discussions, the Council reaffirmed its commitment to the program and pledged policy and financial support to ensure its successful completion.

A major inconsistency in the policy should be noted. To reduce the pressure leading to urban sprawl in a rapidly growing urban area, increased density in existing parts of the community is necessary. Protests by residents of older neighborhoods resisting densification, where density makes sense in terms of overall growth control, is difficult for elected officials to ignore. The result is contradictory policies which permit as little development as possible in the future urbanizing tier and, at the same time, refuse densification in significant urbanized areas where the overall growth management strategy calls for it. No solution to such a political dilemma has been offered. Indeed, the dilemma itself is rarely publicly addressed.

Early discussions at the City Council made it clear that the Mayor and the Council would support added environmental protection. The Council adopted an ordinance that was modified with many of the provisions of Proposition H and was enacted on a permanent basis as the Resource Protection Ordinance.²⁴ The ordinance prevents all construction or demolition within certain environmentally sensitive zones without a resource protection permit.

The City Council also wanted the option to reimpose an IDO-style building permit allocation system. In an attempt to prepare for future needs the Council introduced and adopted the Procedural Ordinance for Interim Development Control in 1989.²⁵ The Council expressed a need for this ordinance in order to protect the public health, safety and welfare and to prevent unplanned development that would exacerbate further public facility and service problems. The ordinance sought an orderly and phased buildout consistent with applicable community plans and regional growth forecasts.

The effective implementation of the procedural ordinance for interim development control depends on adequate development monitoring. When making growth management decisions, established procedures for regular monitoring of development activity are necessary to ensure that rapid development does not adversely affect the public health,

24. San Diego Municipal Code § 101.0462 (1989).

25. San Diego Municipal Code § 101.0260 (1989).

safety and welfare. While the Council's directive did not include a specific enactment, City management in the affected departments received a strong message. The City's building inspection, planning, and engineering and development departments are all involved in tracking final maps, rezonings, subdivision approvals, building, grading and other permits.

Another component of the growth management element related to management of transportation demand. The Council added an ordinance to implement the first program component of San Diego's comprehensive plan for transportation management.²⁶ The first component specifies employer, building owner and developer requirements for vehicle trip reductions and contributions to help comply with federal and state mandated clean air standards through transportation demand management. The program attempts to reduce traffic congestion and improve air quality by decreasing the number of employees who drive their cars to work during peak periods. It regulates development of parking facilities and requires employers to monitor employee transportation arrangements.

As a final action in resolving the first step in growth management issues, the Council established the Citizens Finance Committee, thus making the transition to the second step in the growth management process: facilities financing. A cherished goal of advocates of "pay as you go" development is that all public facilities and services necessary to support newly built residential areas be in place when the first new residents arrive. It is doubtful that the goal is practical in light of the population densities needed to finance initial development of the facilities and services. San Diego's brief history offers no example of a new development of significant size having met this goal.

II. CONSTITUTIONAL LIMITATIONS

A. *Proposition 13*

In June 1978, California voters adopted the previously mentioned taxation limitation initiative, commonly called Proposition 13. It added Article XIII A to the California Constitution,²⁷ which significantly reduced state and local taxing authority and made public financing problems in newly developing and older communities much more difficult.

26. San Diego Municipal Code § 71.0101-71.0161 (1989).

27. CAL. CONST. art. XIII A (Deering 1989).

Proposition 13 limits ad valorem property tax rates to one percent of “full cash value” of the property, plus an amount for any indebtedness approved by the voters prior to the measure’s July 1, 1978 effective date. Subsequent tax rate increases are permitted only for bonded indebtedness for the purpose of acquisition or improvement of real property approved by a two-thirds vote of the electorate. It also limits increases in assessed valuation to two percent per year and provides that reassessment to a new “appraised value” is permitted only on change of ownership or new construction. Finally, Proposition 13 prohibits state and local governments from imposing any new ad valorem taxes and requires a two-thirds vote of the electorate to impose “special taxes.”

Proposition 13 was promptly challenged, but the California Supreme Court, exercising original jurisdiction due to the great importance of the issues, upheld the constitutionality of the initiative in *Amador Valley Joint Union High School District v. State Board of Equalization*.²⁸ The challengers, government agencies and concerned private citizens, argued that the initiative was invalid for a number of reasons including: (1) Proposition 13 is a constitutional revision, not an amendment, and cannot be adopted through the initiative process; (2) it violates the state constitutional requirement that an initiative must not contain more than one subject; (3) it violates equal protection of the laws; (4) it violates the right to travel; (5) it constitutes an unlawful impairment of contracts; (6) the title and summary of the initiative are misleading; and (7) it is too vague to be rationally and uniformly implemented and interpreted. The court, in a limited inquiry, examined “only those principal, fundamental challenges to the validity of Article XIII A as a whole ”and rejected all of the alleged deficiencies.”²⁹

Proposition 13 has a drastic impact on local government because it restricts availability of revenue and limits the ability to impose new taxes. As discussed later,³⁰ however, California courts have determined that, while the language of Article XIII A is ambiguous on the subject, Proposition 13 does not limit “special assessments” which remain a viable financing tool for local improvements.

The *Amador* the court, although upholding its validity, narrowly construed Proposition 13’s purpose as effecting only “real property tax

28. 22 Cal. 3d 208, 583 P.2d 1281, 149 Cal. Rptr. 239 (1978).

29. *Id.* at 219, 583 P.2d at 1283, 149 Cal. Rptr. at 241.

30. See *infra* Part III.

relief.”³¹ The court found Section 4, which limited the ability of local government to impose “special taxes” by requiring a two-thirds vote, to be related functionally to real property taxation relief. This is so because Section 4 limits the ability of local governments, by imposing nonproperty taxes, to replace the revenues lost as a result of the initiative.

In *Los Angeles County Transportation Commission v. Richmond*³² the court held that Section 4 should be construed narrowly, with ambiguities resolved in favor of “cities,” “counties” and “special districts.” The local governments should be permitted to enact “special taxes” because of the “fundamentally undemocratic nature of the requirement for an extraordinary majority.”³³ Thus, the court upheld the Los Angeles County Transportation Commission’s imposition of a “retail transaction and use tax” with a majority, but less than two-thirds vote. The tax was imposed to finance an efficient public transportation system in Southern California. The court determined that “special district” as used in Section 4 encompasses only entities empowered to levy a property tax.

Then, in *City and County of San Francisco v. Farrell*,³⁴ the California Supreme Court narrowed the definition of “special taxes.” A majority of San Francisco’s voters, but less than two-thirds, had approved an extension of the expiration date of payroll and gross receipts tax increases. The proceeds were placed in the general fund to be used for general governmental purposes. The court held that the process used by San Francisco did not create a “special tax” requiring two-thirds voter approval. “Special taxes” are those “levied for a specific purpose,” rather than a levy placed in a general fund to be used for governmental purposes.³⁵

1. Proposition 62.

In response to *Farrell*, the voters approved Proposition 62 in November 1986 which was clearly an attempt to restrict the application of the *Farrell* decision. Proposition 62 is a statutory revision, not a constitutional amendment. It provides that all taxes are either “general”

31. 22 Cal. 3d at 230, 583 P.2d at 1283, 149 Cal Rptr. at 248.

32. 31 Cal. 3d 197, 643 P.2d 941, 182 Cal. Rptr. 324 (1982).

33. *Id.* at 205, 643 P.2d at 945, 182 Cal. Rptr. at 328.

34. 32 Cal. 3d 47, 648 P.2d 935, 184 Cal. Rptr. 713 (1982).

35. *Id.* at 57, 648 P.2d at 940, 184 Cal. Rptr. at 718.

or "special." Special taxes, consistent with Proposition 13, require a two-thirds vote of the local electorate. General taxes, however, require a two-thirds vote of the local legislative body *and* a majority vote of the voters voting in the election.

San Diego and other California charter cities³⁶ have determined that Proposition 62 does not apply to them.³⁷ As far as general law cities are concerned, the constitutionality of the provision of Proposition 62 requiring voter approval is suspect based on article II, section 9(a), of the California Constitution which exempts tax levies from the referendum power.³⁸

2. Equal Protection Standards.

Although Proposition 13 withstood constitutional challenges initially, new decisional law may support renewed equal protection challenges. In *Amador* the California Supreme Court held an equal protection challenge to Proposition 13 was premature, but nevertheless

36. A state may grant municipalities "home rule" powers which enable the inhabitants of the locality the power to frame a charter for local government. The purpose of the home rule power is to eliminate the authority of the legislature over the municipality, and to bestow on the municipalities the power of local self-government as to all "municipal concerns" that are not in conflict with the constitution or applicable general laws. MCQUILLAN, MUNICIPAL CORPORATIONS § 3.21 (3d ed. 1987). In California this power is given by CAL. CONST. art. XI, § 7.

37. Upon review, the Attorney General and the Legislative Analyst both concluded that, in their view, the measure was inapplicable to charter cities and placed comments to that effect in their analysis for the sample ballot prepared for the November 1986 election. Mr. Howard Jarvis, a major proponent of the measure, filed an action of mandamus seeking to delete these comments in the sample ballot. Following a hearing in August 1986, the Superior Court denied the writ on the grounds that the subject matter of the initiative (taxation and elections) was a "municipal affair" and as a statutory enactment could not apply to charter cities. Based on this, and the cases of *A.B.C. Distrib. Co. v. City and County of San Francisco*, 15 Cal. 3d 566, 542 P.2d 625, 125 Cal. Rptr. 465 (1975), and *Sonoma County Org. of Pub. Employees v. County of Sonoma*, 23 Cal. 3d 296, 591 P.2d 1, 152 Cal. Rptr. 903 (1979), it was determined that Proposition 62 does not apply to San Diego, as a chartered city. *San Diego Op. City Att'y* 903 (1987).

38. See D. CURTIN, CALIFORNIA LAND-USE AND PLANNING LAW 140 (1989). In *City of Westminster v. County of Orange*, 204 Cal. App. 3d 623, 251 Cal. Rptr. 511 (1988), the court invalidated the "window period" provision of Proposition 62. Curtin concludes that "as a result of the reasoning contained in *City of Westminster*, Proposition 62's voter approval requirements for general taxes is probably invalid; however, the two-thirds vote requirement for special taxes clearly survives *City of Westminster* because it merely parallels Article XIII A, section 4, of the California Constitution." CURTIN, *supra*, at 141.

decided Proposition 13 withstood a facial constitutional attack.³⁹ The argument that Proposition 13 denies equal protection states that, by the “rollback” of assessed value to the 1975-76 fiscal year, two substantially identical homes, located side-by-side and receiving the same level of governmental services, will be assessed and taxed at different levels depending on their date of acquisition.

The *Amador* court held that the system of taxation under Proposition 13 had the rational basis required by the constitution. Basing property taxes on the value of the property when acquired except for property bought prior to 1975, which is assessed at the 1975-76 full cash value, is

fair and equitable in that [the property owner's] future taxes may be said reasonably to reflect the price [the buyer] was originally willing and able to pay for his property, rather than an inflated value fixed, after acquisition, in part on the basis of sales to third parties over which sales he can exercise no control.⁴⁰

Thus, the court said there was a reasonable basis for the assessment and Proposition 13 withstood the facial attack, although the court left open the question of another challenge should an actual controversy arise.

Recently, the United States Supreme Court considered a similar challenge to a taxation scheme in West Virginia. In *Allegheny Pittsburgh Coal Co. v. County Commission of Webster County*,⁴¹ the Court held that the disparity in property taxes for similarly situated property violates the equal protection clause of the U.S. Constitution. The West Virginia Constitution provides, with certain exceptions, that taxation must be equal and uniform and that property be taxed in proportion to its value. The Webster County method of tax assessment instead taxed newly acquired property based on its purchase price. The County scheme made only minor adjustments to property which had not been recently sold, resulting in gross disparities of eight to thirty-five times the assessed value for similar properties.

In reaching its decision that the scheme violated equal protection, the Court stated that states have broad taxing powers, and “[i]n each case, the constitutional requirement is the reasonable attainment of a rough equality in tax treatment of similarly situated property own-

39. *Amador Valley Joint Union High School Dist. v. State Bd. of Equalization*, 22 Cal. 3d 208, 233, 583 P.2d 1281, 1292, 149 Cal. Rptr. 239, 250 (1978).

40. *Id.* at 235, 583 P.2d at 1293, 149 Cal. Rptr. at 251.

41. 109 S. Ct. 633 (1989).

ers.”⁴² A state may divide different kinds of property into classes with different tax burdens as long as the divisions and burdens are reasonable. The Court held that the procedure for assessment used in Webster County was not reasonable and therefore violated the equal protection rights of the owners of newly purchased properties.

It is not yet clear what impact *Allegheny Pittsburgh* will have in California. The case does, however, open to question the validity of Proposition 13. The Court, in a footnote, said:

[W]e need not and do not decide today whether the Webster County assessment method would stand on a different footing if it were the law of a state, generally applied, instead of the aberrational enforcement policy it appears to be. The State of California has adopted a similar policy known as Article XIII A of its Constitution, popularly known as ‘Proposition 13.’ . . . The system is grounded on the belief that taxes should be based on the original cost of property and should not tax unrealized paper gains in the value of the property.”⁴³

Although the California Supreme Court upheld Proposition 13 in *Amador*, the lawsuit involved only a facial challenge to the initiative. Now actual controversies have arisen. In fact, there is currently litigation over the equal protection issue in three California counties. In San Diego County, a corporation purchased property for \$730,000 in November 1987. The tax base prior to its purchase of the property was \$175,839, approximately one quarter of the base after the sale. Therefore, the corporate plaintiff is alleging the tax system mandated by Proposition 13 is invidiously discriminatory because the corporation bears a disproportionately greater tax burden than similarly situated property owners. The trial court granted the defendants’ demurrer with prejudice on the basis that *Amador* was controlling.⁴⁴ The plaintiff has appealed the ruling, which is pending as of this writing.

Other challenges to Proposition 13 have occurred in Contra Costa County and Los Angeles. A Contra Costa property owner is gathering information to enter a stipulation with the county to measure the disparity in the assessed value of similarly situated property. In Los Angeles, a lawyer who bought a Baldwin Hills home discovered her taxes

42. *Id.* at 638.

43. *Id.* at 638 n.4.

44. *Northwest Fin., Inc. v. State Bd. of Equalization and San Diego County*, No. 611092 (San Diego Superior Court, Order Sustaining Demurrer of San Diego County and the Demurrer of the State Board of Equalization without Leave to Amend and Directing Entry of Judgment, Sept. 14, 1989).

were five times that of a neighbor. A lawsuit ensued and has followed a course similar to the San Diego case. When confronted with the same Proposition 13 issue, another trial court granted the defendant's demurrer on the basis that *Amador* was controlling.⁴⁵

Whatever the final outcome of Proposition 13 challenges, property taxes will remain unable to fund capital facilities for new growth as well as existing services. Alternative methods to finance infrastructure and accommodate growth therefore remain an important governmental goal. Proposition 13 supporters steadfastly maintain that property taxes collected in California under the measure have surpassed both the inflation rates and population growth. Be that as it may, public treasuries have been unable to satisfy the growing public need for new and enhanced facilities and services.

B. The Gann Limit

During a special statewide election in November 1979, California's voters approved the Gann Initiative, which added Article XIII B to the California Constitution.⁴⁶ Its purpose was to protect citizens from excessive taxation and to curb excessive governmental spending.⁴⁷

Article XIII B limits increases in annual spending of state and local taxes to a level equal to changes in population and the national cost of living. Due to California's higher rate of inflation, the effect of the Gann limit has been to force a decrease in real per capita tax appropriations. Appropriations subject to the limitation do not include debt service or appropriations required to comply with court or federal government mandates. Appropriations received in excess of the limit are required to be turned over to school districts.⁴⁸ Section 4 provides for a waiver of the "Gann limit." The Gann limit waiver, however, requires a popular vote and is limited to four years. Upon expiration of the waiver time period, the Gann limit either is reapplied or a further vote to extend the waiver is required.

Article XIII B does not limit the spending of funds from all sources; it only limits the authorization to spend "proceeds of taxes." In

45. *Nordlinger v. Los Angeles County* (L.A. S.Ct., filed Sept. 28, 1989).

46. CAL. CONST. art. XIII B (Deering 1989).

47. *Huntington Park Redev. Agency v. Martin*, 38 Cal. 3d 100, 109, 695 P.2d 220, 225, 211 Cal. Rptr. 133, 138 (1985).

48. CAL. CONST. art. XIII B, § 2(a). Previously, the excess tax revenues were returned to the taxpayers. Proposition 98, effective Nov. 9, 1988, changed that law.

County of Placer v. Corin,⁴⁹ the court held "special assessments" are not "proceeds of taxes" and, therefore, are not included for purposes of the spending limitation. The court stated that "proceeds of taxes" were those charges levied to raise *general revenues* for the local entity. Otherwise, the court said, local governments would be deprived of the ability to fund the construction of major improvements for a particular area within their jurisdictions.⁵⁰

The June 1990 ballot will contain some proposed changes to the Gann limit in the form of a constitutional amendment. The proposed changes are part of a budget compromise between the Governor and legislature.⁵¹ The compromise attempts to answer concerns that the Gann limit is too restrictive and that it restricts California's ability to finance the service and facility needs of its growing population.

A significant change would liberalize the annual adjustment to the spending limit, currently based on the change in cost of living and population. The proposed amendment would be tied more closely to economic growth; measuring the cost of living by the change in California per capita personal income, instead of by the Consumer Price Index. In addition, local governments will have the option to measure the change in personal income by the percentage change from the prior year of the local assessment roll for nonresidential property.⁵² Despite the prospect of some liberalization of Gann initiative limits, other financing means will remain important to the achievement of any policy that new development must "pay its own way." The remaining sections discuss how such a policy can be accomplished.

III. THE APPLICABLE LAW—CASE DISCUSSION

In order to meet public service needs in a growing community, municipalities have been forced to identify or, in many cases, invent legally acceptable financing mechanisms. Courts have had to balance the government interests in providing services such as parks, roads, schools, libraries and police and fire protection against the due process, equal protection and other property rights of developers. Discussion of the fees, assessments, land dedications and other methods of financing

49. 113 Cal. App. 3d 443, 170 Cal. Rptr. 232 (1980).

50. *Id.* at 453, 170 Cal. Rptr. at 242.

51. 89 Municipal Finance Report 5 (Orrick, Herrington & Sutcliff 1989).

52. *Id.*

public facilities and services made necessary by development are lumped under the general term "exactions."

A. Authority

In evaluating the validity of exactions, courts first must determine whether the municipality imposing a condition amounting to an exaction had the authority to do so in the first place.⁵³ In California, such authority is found in the home rule powers given municipalities in the state constitution.⁵⁴ Article XI, § 7 of the California Constitution provides that "[a] county or city may make and enforce within its limits all local, police, sanitary and other ordinances and regulations not in conflict with general laws." Courts have interpreted the constitutional police power to include land use regulation. As one court stated: "A city's desire to 'grow at an orderly pace and in a compact manner' is clearly encompassed within the concept of 'public welfare.'" ⁵⁵

In *Associated Home Builders, Inc. v. City of Walnut Creek*,⁵⁶ the California Supreme Court found within the state's police powers a statutory scheme requiring land dedication or, in lieu, fees as a condition to subdivision approval.⁵⁷ Since *Walnut Creek*, California courts have generally upheld the authority of municipalities to require developers of property to pay impact fees.⁵⁸

53. See, e.g. Morgan, Strauss and Leitner, *State Impact Fee Legislation*, LAND USE L., Jan. 1988, at 3; Smith, *From Subdivision Improvement Requirements to Community Benefit Assessments and Linkage Payments: A Brief History of Land Development Exactions*, 50 LAW & CONTEMP. PROBS. 5, 9-10 (1987); Callies, *Review Essay: Impact Fees, Exactions and Paying for Growth in Hawaii*, 11 U. HAW. L. REV. 295, 307 (1989); CAL. CONST. art. XI, § 7.

54. CAL. CONST. art. XI, § 7.

55. *Griffin Dev. Co. v. City of Oxnard*, 39 Cal. 3d 256, 266, 703 P.2d 339, 344, 217 Cal. Rptr. 1, 6, (1985) (citing *Dateline Builders, Inc. v. City of Santa Rosa*, 146 Cal. App. 3d 520, 528, 194 Cal. Rptr. 258, 263 (1983)). *Griffin* involved the regulation of converting apartments into condominiums.

56. 4 Cal. 3d 633, 484 P.2d 606, 94 Cal. Rptr. 630 (1971).

57. CAL. BUS. & PROF. CODE § 11546 (West 1987) provided: "The governing body of a city or county may by ordinance require the dedication of land, the payment of fees in lieu thereof, or a combination of both, for park and recreational purposes as a condition to the approval of a final subdivision map"

58. Callies, *supra* note 53, at 308. See, e.g., *Trent Meredith, Inc. v. City of Oxnard*, 114 Cal. App. 3d 317, 170 Cal. Rptr. 685 (1981) (school impact fees); *Candid Enter. Inc. v. Grossmont Union High School Dist.*, 39 Cal. 3d 878, 705 P.2d 876, 218 Cal. Rptr. 303 (1985) (school impact fees); *J.W. Jones Cos. v. City of San Diego*, 157 Cal. App. 3d 745, 203 Cal. Rptr. 580 (1984); *City of San Diego v. Holodnak*, 157 Cal. App. 3d 759, 203 Cal. Rptr. 797 (1984).

B. *Nexus Analysis*

Once a court determines a municipality has authority to impose a condition or charge a fee amounting to an "exaction," it must determine whether the action violates of the state or federal constitution.⁵⁹ The constitutional issues generally involve whether there has been a violation of due process or equal protection, a taking without "just compensation" or whether a fee is a "special tax" requiring two-thirds voter approval pursuant to Proposition 13.⁶⁰

The determination to uphold an exaction ordinance involves issues of reasonableness. There must be a reasonable relationship, or "nexus," between the condition imposed or fee charged and the need generated by the new development. The California "reasonable relationship" test is broader than rules of other states.⁶¹ The condition or fee will be upheld as long as "the amount and location of land or fees shall bear a reasonable relationship to the use of the facilities by the future inhabitants" of the development.⁶²

1. Off-Site Exactions.

As early as 1949, in *Ayres v. City Council of Los Angeles*,⁶³ the California Supreme Court upheld a city's imposition of conditions for approval of a subdivision. As required by the Subdivision Map Act, the developer submitted a tentative map to the city planning commission to subdivide thirteen acres. The commission attached four conditions to approval of the subdivision, including dedication of a street located outside the subdivision. Over the developer's objections, the court held that "conditions are lawful which are not inconsistent with the [Subdi-

59. Morgan, Strauss and Leitner, *supra* note 53, at 4.

60. Proposition 13 provides: "Cities, counties and special districts, by a two-thirds vote of the qualified electors of such district, may impose special taxes on such district, except ad valorem taxes on real property or a transaction tax or sales tax on the sale of real property within such city, county or special district." CAL. CONST. art. XIII A, § 4.

61. Callies, *supra* note 53, at 300; Morgan, Strauss and Leitner, *supra* note 53, at 4. The strictest standard, adopted by Illinois, requires the fee to be "specifically and uniquely attributable" to the proposed development. Thus, in Illinois, the "rational nexus" test requires the new development to create a need which bears a proportionate relationship to the fee or condition and the funds must be properly earmarked towards the stated needs. Callies, *supra* note 53, at 300; Morgan, Strauss and Leitner, *supra* note 53, at 4.

62. *Associated Home Builders v. City of Walnut Creek*, 4 Cal. 3d 633, 640, 484 P.2d 606, 615, 94 Cal. Rptr. 630, 635 (1971).

63. 34 Cal. 2d 31, 207 P.2d 1 (1949).

vision] Map Act and the ordinances and are reasonably required by the subdivision type and use as related to the character of local and neighborhood planning and traffic conditions.”⁶⁴

Rejecting the argument that the conditions amount to an exercise of the power of eminent domain, the court noted the importance of uniformity of neighborhood design and plan. In addition, the court explained that each subdivision adds to the traffic burden, so it did not matter that the conditions imposed benefit the city as a whole. The court stated that it is also appropriate to consider future population needs and that it was the subdivider who was seeking the advantages of subdividing. Therefore, he had the duty to comply with reasonable conditions “so as to conform to the safety and general welfare of the lot owners in the subdivision and of the public.”⁶⁵

2. In Lieu Fees.

Associated Home Builders Inc. v. City of Walnut Creek,⁶⁶ is the leading California case upholding a statute authorizing cities or counties to require, as a condition of subdivision approval, dedication of land or, in lieu, fees for park or recreational purposes. A class action suit challenged the constitutionality of California Business & Professions Code section 11546 and a local ordinance enacted to implement the state statute. Plaintiffs alleged that the state statute violated due process and equal protection as guaranteed by the state and federal constitutions and that the statute constituted a taking of private property for public use without just compensation in violation of the fifth amendment. Rejecting the arguments, the court observed that:

the subdivider realizes a profit from governmental approval of a subdivision since his land is rendered more valuable by the fact of subdivision, and in return for this benefit the city may require him to dedicate a portion of his land for park purposes whenever the influx of new residents will increase the need for park and recreational facilities.⁶⁷

The court rejected the plaintiff’s argument that the need for the park and recreational facilities must be attributable solely to the population increase generated by the new subdivision to withstand constitutional attack. The court relied on *Ayres* in holding that it was immaterial that

64. 34 Cal. 2d at 37, 207 P.2d at 5.

65. 34 Cal. 2d at 42, 207 P.2d at 7.

66. 4 Cal. 3d 633, 484 P.2d 606, 94 Cal. Rptr. 630 (1971).

67. *Id.* at 644, 484 P.2d at 618, 94 Cal. Rptr. at 639.

the city benefits as a whole from the dedication by having new city parks or recreational facilities, or that future as well as present needs were taken into consideration.⁶⁸ Similarly, the particular subdivision need not be the sole cause of the need for the dedication.⁶⁹ The court also held that a sufficient nexus existed because the statute provided that land dedication or fees were to be used only to provide park or recreational facilities to serve the subdivision, and that the amount and location of land or fees must bear a reasonable relationship to the use of the facilities by the subdivision's future inhabitants.⁷⁰

The court also rejected an argument that paying the fee and then later paying property taxes constitutes a double tax. Double taxation exists only when "two taxes of the same character are imposed on the same property, for the same purpose, by the same taxing authority within the same jurisdiction during the same taxing period."⁷¹ The court also said it was not arbitrary that the statute applied only to subdivisions and not, for example, to apartments. Because the subdivision development is generally horizontal, while an apartment house is generally vertical, the legislature could reasonably conclude that a subdivision is larger in dimension, thus reducing to a greater extent the available open space.⁷² Thus, the court seemed to approve more creative financing mechanisms.

3. Special Assessments.

*County of Fresno v. Malmstrom*⁷³ held that the property tax limitation imposed by Proposition 13 does not apply to special assessments and bonds levied pursuant to the Improvement Act of 1911⁷⁴ and the Municipal Improvement Act of 1913.⁷⁵ The statutes provide a procedure, used for over 60 years, to charge property owners a fee who benefit from improvements for public improvements, including streets, sewers, sidewalks, water systems, lighting and public utility lines.

First, the court determined that the one percent maximum tax limi-

68. *Id.* at 638, 484 P.2d at 615, 94 Cal. Rptr. at 639 (citing *Ayres*, 34 Cal. 2d at 41, 207 P.2d at 7).

69. 4 Cal. 3d at 638, 484 P.2d at 613, 94 Cal. Rptr. at 634.

70. *Id.* at 640, 484 P.2d at 611-12, 94 Cal. Rptr. at 635-36.

71. *Id.* at 642, 484 P.2d at 613, 94 Cal. Rptr. at 637.

72. *Id.* at 642-43, 484 P.2d at 614, 94 Cal. Rptr. at 638.

73. 94 Cal. App. 3d 974, 156 Cal. Rptr. 777 (1979).

74. CAL. STS. & HIGH. CODE §§ 5000-6794 (Deering 1978).

75. CAL. STS. & HIGH. CODE §§ 10,000-10,609 (Deering 1978).

tation imposed on ad valorem taxes did not limit special assessments and bonds levied pursuant to improvement acts. Proposition 13 sought to control ad valorem property taxes and government spending. Special assessments are used to finance improvements benefitting specific parcels of property. To pay for the improvements out of general funds would be unjust because only certain property owners would receive a benefit. Therefore, the court decided it is consistent with the purposes of Proposition 13 to conclude that its limitations do not apply to special assessments.⁷⁶

Second, the court found that statutory special assessments were not "special taxes" requiring two-thirds vote. The court stated that special assessments are not really taxes at all because they charge for benefits to the property and thus cannot exceed the benefits the assessed property receives from the improvement; a special tax need not benefit specific property.⁷⁷

Similarly, in *Solvang Municipal Improvement District v. Board of Supervisors*⁷⁸ the court held that, despite an incongruity in Proposition 13,⁷⁹ there is no limitation on special assessments. Acting pursuant to local and state statutes, Solvang Municipal Improvement District created a parking district. It issued bonds to acquire three lots for public parking. The bonds were to be paid off by imposing special assessments against benefitted real property made more valuable by the increased availability of public parking. Special assessments were to be levied annually according to assessed value, accounting for the amount of traffic generated by the establishment and amount of private parking

76. 94 Cal. App. 3d at 982, 156 Cal. Rptr. at 782.

77. 94 Cal. App. 3d at 984, 156 Cal. Rptr. at 783.

78. 112 Cal. App. 3d 545, 169 Cal. Rptr. 391 (1980).

79. CAL. CONST. art. XIII A. Article XIII A § 1 provides as follows:

(a) The maximum amount of any ad valorem tax on real property shall not exceed one percent (1%) of the full cash value of such property. The one percent (1%) tax to be collected by the counties and apportioned according to law to the districts within the counties.

(b) The limitation provided for in subdivision (a) shall not apply to ad valorem taxes or special assessments to pay the interest and redemption charges on any indebtedness approved by the voters prior to the time this section becomes effective.

Thus, subdivision (b) declares that the limitation in subdivision (a) does not apply to special assessments or ad valorem taxes; but subdivision (a) states only that *ad valorem* taxes on real property shall not exceed one percent. The *Solvang* court held this reference to special assessments in subdivision (b) was surplusage added due to an abundance of caution. 112 Cal. App. 3d at 556, 169 Cal. Rptr. at 398.

made available. Assessments were regularly levied and collected until, when Proposition 13 passed, the system was challenged. The first issue was whether Proposition 13 would apply retroactively to deprive the bondholders of their promised source of repayment. The court held that it cannot because to do so would impair the obligation of a validly executed contract.⁸⁰

The court then decided that a special assessment for local improvements directly benefitting the assessed property is not within the Proposition 13 one percent increase limitation on ad valorem real property taxes. The court found a clear distinction between taxes "which are levied for general revenue and for general public improvements; and special assessments, which are levied for local improvements which directly benefit specific real property."⁸¹

The court stated the initiative was directed at general government spending and general real property taxes levied to finance such spending, not at special assessments for local improvements directly benefitting specific real property.⁸² The court defined special assessments as a charge imposed on particular real property for a local public improvement of direct benefit to that property. . . . The rationale of special assessments is that the assessed property has received a special benefit over and above that received by the general public. The general public should not be required to pay for special benefits for the few, and the few specifically benefitted should not be subsidized by the general public.⁸³

There is nothing in Proposition 13's history that indicates it was intended to encompass special assessments for local improvements benefitting specific real property. Therefore, although the language of Article XIII A is ambiguous, the court decided Proposition 13 was not to apply to special assessments.

4. FBAs.

To manage growth effectively and ensure that public services and facilities were developed concurrent with need, the City of San Diego adopted a financing mechanism called Facilities Benefit Assessment (FBA). In 1984, the appellate courts validated the City's approach in

80. 112 Cal. App. 3d at 550, 169 Cal. Rptr. at 394.

81. *Id.* at 553, 169 Cal. Rptr. at 396.

82. *Id.* at 556, 169 Cal. Rptr. at 398.

83. *Id.* at 552, 169 Cal. Rptr. at 395.

*J.W. Jones Cos. v. City of San Diego*⁸⁴ and *City of San Diego v. Holodnak*.⁸⁵

The City adopted an ordinance⁸⁶ in 1980 to implement the Progress Guide and General Plan Revision, which concerned “the acquisition, construction and improvement of public facilities.”⁸⁷ The ordinance provides that the city designate “areas of benefit.” Such areas are defined as lands receiving special benefits from construction, acquisition and improvement of public facilities projects and were to be assessed the cost of the public facilities. “Public facilities projects” are defined as “any and all public improvements the need for which is directly or indirectly generated by development.”⁸⁸ The Progress Guide and General Plan provides that certain public facilities be financed by “special assessment proceedings, consideration from developers, the City’s General Fund or some combination thereof.”⁸⁹

Under the FBA ordinance, after receiving a written report with an implementation program for future development, a financing plan, or both, and information on costs to be apportioned among the parcels in proportion to the benefits received,⁹⁰ the City Council adopts a resolution of intention.⁹¹ Protests are then heard at a hearing. If a majority of owners disagree, the proceedings are abandoned unless the City Council overrules the protests by an affirmative vote of four-fifths based on the interest of the public health, safety or general welfare. If there is no protest or the protest is overruled, the Council may order a resolution of designation delineating the area of benefit and establishing an FBA against each parcel. Based on this resolution, a map is then filed with the City Clerk, and the assessments become a lien on the property in the amount of the FBA.

The lien must be paid before building permits are issued for land development. FBA payments are placed in a special fund to be expended solely for the purpose for which it was assessed and levied. There is a provision in the ordinance for annual adjustments of FBAs

84. 157 Cal. App. 3d 745, 203 Cal. Rptr. 580 (1984).

85. 157 Cal. App. 3d 759, 203 Cal. Rptr. 797 (1984).

86. SAN DIEGO, CA, MUNICIPAL CODE §§ 61.2200-61.2216 (1980).

87. *Id.* § 61.2200(e).

88. *Id.* § 61.2202(j).

89. *Id.* § 61.2200(e).

90. *Id.* § 61.2203.

91. *Id.* § 61.2004.

to reflect the changes in actual or estimated costs of the capital improvements.

The court in *J.W. Jones Cos. v. City of San Diego* upheld the FBA financing approach as a valid exercise of San Diego's power to require undeveloped land to bear the costs of the public facilities necessary for the health and welfare of future residents.⁹² The court stated that "[t]he vision of San Diego's future as sketched in the general plan is attainable only through the comprehensive financing scheme contemplated by the FBA."⁹³ The *Jones* court rejected the developers' arguments that the FBA amounted to a special tax violating the two-thirds voter approval requirement of the California Constitution, that it was an invalid special assessment because it is not based on special benefits to the assessed properties and that it violated equal protection because it did not assess developed property.

The court found that the FBA, used to finance street improvements and parks, was not a special tax because it did not exceed the cost of the improvements, it was not made on an ad valorem basis and the assessment did not result in personal liability. The court found that contiguity was not essential to the benefit conferred because the City considered the proximity of the parcels to the public facility.⁹⁴

The court reasoned that the fact that developed property was not assessed did not offend equal protection principles. The classification need only have a reasonable basis, and because the proposed development creates the need for public facilities, it is reasonable that this undeveloped land bear the cost. Existing public facilities may be presumed to adequately serve already developed property. "The incidental fallout of benefit to developed parcels does not result in such inequality as to offend equal protection concepts."⁹⁵ In addition, the court stated that it was proper for the City to aggregate all the improvements in the FBA and to spread the costs to all undeveloped parcels in the area of benefit. This method avoids a piecemeal approach that would "lead to a haphazard, random growth putting heavy burdens on those seeking early development of their land and lighter loads upon those coming into development at later times."⁹⁶

The companion case, *City of San Diego v. Holodnak*, addressed the

92. 157 Cal. App. 3d at 758, 203 Cal. Rptr. at 589.

93. 157 Cal. App. 3d at 758, 203 Cal. Rptr. at 589.

94. 157 Cal. App. 3d at 756, 203 Cal. Rptr. at 588.

95. 157 Cal. App. 3d at 757, 203 Cal. Rptr. at 589.

96. *Id.*

FBA used to finance construction of a water line, community and neighborhood parks, a public library branch, a park and ride facility, a fire station and a bridge expansion. The court again upheld the FBA.⁹⁷ Although the community at large will benefit from these public facilities, for example by having more park land or more library services, the court said the primary benefit will be to those within the area of benefit—the properties which are subject to the FBA.

5. The TIDF.

The courts upheld another unique method of facilities financing in *Russ Building Partnership v. City and County of San Francisco*.⁹⁸ It involved the city's Transit Impact Development Fee Ordinance (TIDF), which requires developers of new office space to pay a transit fee as a condition to issuance of a certificate of completion and occupancy. The fee seeks to offset increased transportation costs caused by workers attracted by development of new downtown office space, particularly those commuting during peak hours. The plaintiff, in a class action representing 6,000 downtown San Francisco property owners,⁹⁹ argued the ordinance was an invalid development fee, claiming: (1) it was a "special tax" requiring two-thirds voter approval under the California Constitution; (2) it violated Article XIII B of the California Constitution limiting government spending;¹⁰⁰ (3) it violated due process and equal protection; and (4) it constituted double taxation. The court rejected all the arguments and upheld the fee.

The court held that the TIDF is not a tax and therefore not governed by Articles XIII A or XIII B of the California Constitution. Further, the fees are limited to costs attributable to the new development, are not earmarked for general revenue purposes and, unlike most taxes,

97. 157 Cal. App. 3d 759, 203 Cal. Rptr. 797 (1984).

98. 199 Cal. App. 3d 1496, 246 Cal. Rptr. 21 (1987). *Russ Building Partnership* filed a class action suit to have the TDIF ordinance declared invalid. Others filed a separate suit against the city challenging the retroactive application of the ordinance. The trial judge found in favor of the city in separate trials on both issues. The Court of Appeal upheld the validity of the ordinance and the California Supreme Court denied *Russ*' petition for review, thus leaving intact the appellate court's ruling that the TDIF is a valid development fee. The Court of Appeal reversed the trial court's judgment as to the others, and the California Supreme Court granted review. *Russ Bldg. Partnership v. City and County of San Francisco*, 44 Cal. 3d 839, 750 P.2d 324, 244 Cal. Rptr. 682 (1988). The California Supreme Court held that the TIDF may be imposed on the project without impairing the developers' vested rights.

99. 44 Cal. 3d at 845 n.4, 750 P.2d at 326 n.4, 244 Cal. Rptr. at 684 n.4.

100. See *supra* Part II.B. for discussion of the Gann limit.

are not compulsory, but are only required if the property owner decides to develop office space.¹⁰¹ The court found the TIDF consistent with the purpose of Article XIII A, and the TIDF is not subject to Article XIII B because it is not a special tax, nor a regulatory license, user fee or charge.

The court rejected the equal protection and due process arguments because it is rational to conclude that new office space increases the transportation need during peak hours. The imposition of a fee is not arbitrary and unreasonable, the court stated, and the fact there is incidental benefit to existing buildings is not of such magnitude that it violates equal protection.¹⁰² The court found that the TIDF did not constitute double taxation, because it is not imposed on the basis of property ownership, but rather as "a fee for the privilege of developing real property and to defer increased costs of transit services."¹⁰³ It is charged only at the time of completing construction and does not recur, as do property taxes.¹⁰⁴

C. *Nollan v. California Coastal Commission*

Although California courts have been quite tolerant of creative financing methods needed to allow growth to occur in an orderly fashion, local governments must be cognizant of limitations imposed by the United States Supreme Court. During the 1987 term, the Court handed down three cases dealing with different aspects of the "takings" issue. These cases help define permissible use of the police power to regulate land use.¹⁰⁵ In *Nollan v. California Coastal Commission*¹⁰⁶

101. 199 Cal. App. 3d at 1505, 246 Cal. Rptr. at 25.

102. 199 Cal. App. 3d at 1509, 246 Cal. Rptr. at 27-28.

103. 199 Cal. App. 3d at 1510, 246 Cal. Rptr. at 28.

104. 199 Cal. App. 3d at 1516, 246 Cal. Rptr. at 27-28.

105. Although these cases are often discussed together, this article will not discuss the first two cases because they are only tangentially related to financing. *Keystone Bituminous Coal Assoc. v. DeBenedictis*, 480 U.S. 470 (1987), involved a Pennsylvania statute that regulated coal mine operations. The court rejected the claim that this statute on its face constituted a taking because it was enacted for the general welfare and did not deprive coal mine operators of all economically viable use of their property interests. *First English Evangelical Lutheran Church v. County of Los Angeles*, 482 U.S. 304 (1987), did not address whether there was a "taking," rather it involved the remedy for a temporary taking. The court held that monetary damages were an available remedy for a taking, not merely invalidation of the ordinance. For a complete discussion of this trio of cases, see Freilich & Carlisle, *The U.S. Supreme Court Blockbusters of 1986-1987: Analyzing the Inverse Condemnation and Regulatory Taking Cases in PLANNING, ZONING & EMINENT DOMAIN* (1988).

the Supreme Court reversed a California Court of Appeals decision and held the Coastal Commission's actions forcing an easement deprived plaintiffs of their property without just compensation in violation of the fifth amendment to the Constitution. The *Nollan* decision was a narrow one, but it is an important case dealing with land use regulation and reiterates the requirement of an "essential nexus" between a regulation's impact and its objective.

Important in the Court's opinion about financing mechanisms is its statement that heightened scrutiny is required where actual conveyance of a property interest is made a condition to the lifting of a land use regulation, "since in that context there is heightened risk that the purpose is avoidance of the compensation requirement, rather than the stated police power objective."¹⁰⁷ Although "permanent physical occupation" is not the objective in most land use regulatory situations, in enacting financing mechanisms such as impact fees, the regulations must meet the "essential nexus" or reasonable relationship test enunciated in *Nollan*. Obviously, the standard is easier to meet if there is no physical occupation of the property.

IV. FACILITIES FINANCING TOOLS

In order to progress to the second step in growth management, facilities financing, the San Diego City Council authorized formation of a citizens committee to review the City Manager's long-term financing plan for public facilities. Popularly called the Citizens Finance Committee, the group sought to review standards for public facilities and the cost of meeting those standards, seek and encourage public participation in financing decisions and advise the Mayor and City Council about the most appropriate financing methods.

The committee divided its work into three major parts: (1) *needs appraisal*, to examine existing, desired and projected levels of services and public facilities and to develop criteria for evaluation and prioritization of needs; (2) *capital financing*, to examine existing and alternative vehicles and options to fund various capital facilities; and (3) *operating revenue*, to examine existing and alternative revenue sources that might be used in funding appropriate levels of service. The goals include remedying deficiencies in existing infrastructure, funding oper-

106. 483 U.S. 825 (1987).

107. *Id.* at 841.

ation and maintenance costs and devising financing mechanisms to enable new development to pay for its share of growth.

A. *Needs Appraisal*

The City's strategy for financing facilities includes a comprehensive prioritization of regional needs. An overview report on funding needs for public facilities for the San Diego region was provided to the Citizens Finance Committee. During the next twenty years the City will need \$2.26 billion for construction and acquisition of public facilities. Only \$1.01 billion can be anticipated from existing sources, leaving a \$1.25 billion shortfall to be obtained from funding sources yet to be identified.¹⁰⁸ Other jurisdictions in the region will also be pursuing their own capital programs. For example, San Diego County will need about \$12 million for courts, jails and open space; various school districts will require \$2.25 billion for construction; and various transportation providers will demand \$4 billion for streets, freeways and transit.

In considering financing options, it is important to distinguish various communities, particularly older "urbanized" areas and newer "planned urbanizing" areas. For instance, the current San Diego General Plan, adopted in 1979, differentiates between types of communities, how their facilities should be funded and the standards under which the facilities will be built and operated.

Of the forty-nine community plan areas within the City, thirty-four are classified in the General Plan as urbanized and fifteen are classified as planned urbanizing. The urbanized communities contain approximately 337,500 existing dwelling units. Projections reveal that these communities can accommodate 74,000 new dwelling units for a total buildout of 411,500. Based on these figures, therefore, the urbanized communities are now developed to eighty-two percent of their planned capacity.

Urbanized communities were generally developed prior to the current facility standards and financing policy. To overcome urban facility deficiencies, the 1979 General Plan proposed that urbanized communities receive capital funds from gas and sales taxes. This approach, however, was restricted by Proposition 13's effect on revenue from property taxes, which lead to the proposed use of gas and sales

108. This figure does not include \$2.8 billion that must be identified for the "Clean Water Program" to provide the improvement of our ocean discharges to secondary level and increase reclamation for the region.

taxes for operation and maintenance costs. Generally, the urbanized areas suffer from relatively small revenue, amounts generated from fees and charges coming from new development, while large funding needs remain.

The fifteen planned urbanizing area communities contain about 87,200 existing dwelling units. Projections show that they can accommodate 71,500 additional units, for a total buildout capacity of 158,700. The fifteen communities are at about fifty-four percent of their development capacity. The 1979 General Plan proposed that each community bear the cost of the entire infrastructure required to serve it. Impact fees and assessments entirely fund streets, parks, libraries and fire stations, but not operating, maintenance and replacement costs.

B. *Financing Techniques*

Facilities financing in the 1990s requires consideration of a broad range of financing tools, some of which are tied to the land use process. Different techniques must be used in combination to accomplish the City's goals. The funding strategy for public facilities should be tailored to the type of facility and other factors such as: (1) the service area of the facility; (2) the level of development of the area served; (3) the public perception of need; (4) the relationship between need and type of funding and (5) the constraints on use of various funding devices.

In reviewing the City's needs, the Citizens Finance Committee evaluated several revenue raising techniques to meet capital financing and operating revenue needs. They included a Gann waiver, general obligation bonds, revenue supported issues such as revenue bonds or certificates of participation, development impact fees, special assessments, Mello-Roos districts,¹⁰⁹ reevaluation of sale versus lease of city-owned real estate, an initiative that would require the state to return to cities a "fair share" of state income taxes, a utility user tax, increased state gasoline taxes and motor vehicle fees, additional fees for certain city programs to ensure full cost recovery, a city lottery, raising taxes on card rooms, false alarm fees, parking user fees for parking lots, parking fees in the beach communities, taxes on entertainment tickets, increased business license taxes, privatization of some facilities and serv-

109. See Mello-Roos Community Facilities Act of 1982, CAL. GOV'T CODE §§ 53311 - 53365.7 (Deering 1989).

ices, refuse collection fees, port district revenue sharing and increased transient occupancy taxes.

Obviously, most of the revenue techniques are of broad application. They are capable of relieving general fund shortfalls without application to facility and service funding in growth areas. But they are useful, too, in meeting growth-induced financial needs. Instead of addressing all of the techniques, this Article will discuss some of the more important ones.

1. Land Use Tools.

a. *Citywide Impact Fees and Regional Impact Fees.*

New growth burdens not only the local infrastructure needed to meet demands of a new community, but certain existing citywide and regionwide facilities as well. One financing tool to compensate for the additional load is the citywide and regionwide impact fee.

Citywide and regionwide impact fees target facilities affecting an area larger than just one or two community planning areas. Certain facilities may be of citywide or regionwide benefit, when taken as a whole. Therefore, they are included in the citywide or regionwide impact fee base.¹¹⁰ The fees add to already existing development fees. Citywide and regionwide impact fees, however, will be used for projects considered to benefit the City as a whole rather than individual or small groups of communities. The responsibility for funding a project is allocated on a "fair share" basis between existing development and new development.

An example of a citywide burden is the central library. Without incremental increases in the Library's budget each year to match population growth, more people use the existing library facilities. A citywide impact fee would be based on the current level of service, charging new development a fee to maintain that level on a per capita basis. Proposals currently exist in San Diego to initiate citywide impact fees for the central library, fire, police and public works operations stations and parks and recreation. A procedural ordinance is being drafted for this purpose.

Other facilities, not under the city's responsibility but nevertheless burdened by new growth, are courts, jails and parks and recreational facilities built and operated by county government, but serving city residents. New development naturally results in population increase,

110. The City of San Diego, CA. Managers Report, No. 89-283 (June 2, 1989).

which places an added burden on already crowded courts and jails. The existing facilities, currently funded by the County of San Diego, are insufficient. The County has resorted to setting up courtrooms in hotel rooms across the street from the crowded county courthouse. Jails are overcrowded and well above their rated capacities. Current law enforcement policies, calling for citing and releasing all but felons and violent misdemeanants, affect the quality of life for all San Diegans.

A regionwide impact fee would place the burden of new development on a per capita basis to maintain the current level or capacity of service of the criminal justice system. To the extent that citywide impact fees prove effective, countywide fees also may be required. As with all impact fees, citywide and regionwide fees must meet the "rational nexus" test. That is, a connection must exist between the new development and imposition of the fee. It must be shown that the new growth places additional burdens on the facilities which are to benefit from the fee and that the fee is in proportion to the need generated by the development.

As of January 1, 1989, the California Government Code requires certain findings whenever a local agency establishes, increases or imposes a fee as a condition of approval of a development project.¹¹¹ The local agency must: (1) identify the purpose of the fee; (2) identify the use to which the fee is to be put (if the use is financing public facilities, the facilities must be identified); (3) determine how there is a reasonable relationship between the fee's use and the type of development project on which the fee is imposed; and (4) determine if there is a reasonable relationship between the need for the public facility and the type of development project on which the fee is imposed.¹¹²

The local agency must then determine if there is a reasonable relationship between the amount of the fee and the cost of all or part of the public facility attributable to the development on which the fee is imposed.¹¹³ To counter developers' frequent arguments that large amounts of fees are collected but few are spent, the legislation also requires annual findings regarding unexpended or uncommitted fees five or more years after their receipt. If the proper findings cannot be made, then the local agency must begin a refund procedure to return

111. CAL. GOV'T CODE §§ 66000-66009 (Deering 1989).

112. *Id.* at § 66001(a)(1)(4).

113. *Id.* at § 66001(b).

the fees to the current record owners of the lots or units.¹¹⁴

Because impact fees are not "proceeds of taxes," the Gann limit does not affect their appropriation.¹¹⁵ They are also not subject to Proposition 13's limitations¹¹⁶ because they are not ad valorem property taxes and, similar to the FBA approach validated in *Jones* and *Holodnak*,¹¹⁷ would not be considered "special taxes" requiring two-thirds voter approval.

b. *Special Districts.*

A special assessment district is a financing tool which apportions the benefit received when public improvements are constructed by benefited properties. A major advantage of special districts is that they are not subject to either the Gann limit or Proposition 13's limitations.¹¹⁸

(1) *Citywide Landscaping, Light and Park Assessment Districts.*

The Landscaping and Lighting Act of 1972¹¹⁹ provides a procedure for making certain improvements and maintaining them through an assessment district procedure. Under this scheme the legislative body designates the geographic area that the improvements will benefit.¹²⁰ Improvements that may be constructed under the statute include installation or planting of landscaping; statues, fountains and other ornamental structures and facilities; public lighting facilities; recreational facilities, such as lights, playground equipment, play courts, public restrooms and all necessary work for their construction and the acquisition of parks.¹²¹ The statute requires a report establishing individual assessments, followed by a public hearing before levy of assessments.

Although the statute is limited in the types of improvements which can be financed in this manner, it is effective for the types designated. The authorized financing mechanism will free money from the general fund for other needed services.

114. *Id.* at § 66001(d)-(e).

115. *See supra* Part II.B. for discussion of the Gann Limit.

116. *See supra* Part II.A. for discussion of Proposition 13 limitations.

117. *See supra* Part III.B.4..

118. *See supra* Part II.

119. CAL. STS. & HIGH. CODE §§ 22500-22679 (West Supp. 1990).

120. *Id.* at § 22503.

121. *Id.* at § 22525 (Deering 1989).

(2) *Fire Suppression District (FSD).*

Pursuant to state legislation,¹²² local agencies can also levy an assessment for fire department services to obtain or maintain fire suppression equipment or pay salaries or benefits for fire-fighters. The legislative body must set rates based on certain findings and standards set for various categories of suppression services. Notice is then given and protests are heard. If there is less than a five percent (by value) protest, the legislative body levies the fees. If the protest is more than five percent but less than fifty percent the matter goes to a vote. A simple majority vote is required to establish the fee. However, the proceedings must be abandoned if the protest is over fifty percent.

The fees are a form of special assessment and are based on special benefits conferred by the activity funded. An analogy can be drawn to funding police activities. Both types of services provide the same sort of benefits to the assessed property. Due to the unique nature of this type of financing mechanism, it would seem advisable to institute a validation proceeding to assure its legal validity.

(3) *Facilities Benefit Assessment (FBA).*

Another financing tool effectively used in San Diego for developing properties is the FBA. This approach was discussed in detail in an earlier section of this Article.¹²³

2. Non-Land Use Tools (Other Techniques).

a. *Business License Taxes.*

San Diego currently assesses extremely low business license fees¹²⁴ and ranks lowest in business tax collections among major cities in California on a gross revenue or per capita basis.¹²⁵ Because business license taxes are not generally an important factor in deciding where to operate a business,¹²⁶ in a city such as San Diego they can be an effective

122. CAL. GOV'T CODE §§ 50078-50078.20 (Deering 1989).

123. See *supra* Part III.B.4.

124. San Diego's fees include a flat \$30 fee per business license plus \$2.00 per employee.

125. San Diego Housing Trust Fund Feasibility Study, Revenue Profiles, Table 18; prepared by David Paul Rosen & Associates (June 28, 1989).

126. A nationwide survey of business location executives conducted by Location Management Services found that the most important factors in deciding where to operate a business were quality of life issues such as affordable housing, traffic congestion and air quality.

tive revenue raising technique.

As opposed to charter cities, however, business license taxes are not available to California general law cities to raise revenue. General law cities may not impose a license tax exceeding the cost of regulating the business or which is unrelated to any regulatory purpose.¹²⁷ Business license taxes may be assessed on a variety of bases, such as a flat fee, a percentage of either payroll expenses or gross receipts or the number of employees. There may be exemptions for small businesses.

In *City and County of San Francisco v. Farrell*,¹²⁸ the court determined that because a city's payroll and gross receipts tax was not a "special tax" under Proposition 13, it did not require two-thirds voter approval. The proceeds of the city's tax were placed into the city's general fund, to be used for general governmental expenditures. To hold otherwise would effectively read the word "special" out of the language of section 4 of Proposition 13. The court instead construed the term "special taxes" to mean taxes which are levied for a specific purpose rather than, as with the gross receipt taxes at issue, a levy placed in the general fund to be utilized for general governmental uses. The court found this interpretation consistent with the purpose of Proposition 13, in giving "effective" property tax relief, because a two-thirds vote is still required for the adoption of "special taxes" as defined by the court.¹²⁹

The major problem with a business license tax in payroll or gross receipts tax form is whether it is a prohibited local income tax.¹³⁰ Before imposing such a tax, a local government must proceed cautiously, making certain the tax legislation is carefully drafted and correctly adopted.¹³¹

b. *Privatization.*

Privatization means return of a government function to the private sector or adoption by government of other market-oriented mechanisms to perform the function. Cost-saving methods unavailable to

127. *Cóoper v. Michael*, 157 Cal. App. 2d 176, 64 Cal. Rptr. 842 (1967).

128. 32 Cal. 3d 47, 648 P.2d 935, 184 Cal. Rptr. 713 (1982).

129. 32 Cal. 3d at 57, 648 P.2d at 940, 148 Cal. Rptr. at 718.

130. CAL REV. & TAX CODE § 17052.1 (Deering 1989) (repealed) prohibits local governments from collecting any income taxes, but allowed "any otherwise authorized license tax upon a business measured by or according to gross receipts."

131. See *Weekes v. City of Oakland*, 21 Cal. 3d 386, 579 P.2d 449, 146 Cal. Rptr. 558 (1978) (discussion of the distinction between a business license tax and income tax).

government may allow a private firm to perform the service at a lower cost to government while the firm still earns a profit. Contract bidding is one means of testing the water to determine whether a private market exists and, if so, whether a private firm may provide a service more cheaply than the government. Contract bidding may result in a least-cost service. Because the lowest bid may not translate into the best service, however, it may be necessary to award a bid on the basis of both price and quality.

What functions can be "privatized" will depend on the needs and circumstances of a particular municipality. In San Diego, a likely target for privatization appears to be refuse collection. Currently, a 1919 ordinance adopted by the electorate prohibits San Diego from charging a user fee for trash collection.¹³² This service cost San Diego approximately \$20 million in 1989. In 1990, that figure is budgeted at \$23 million. Thus, besides the potential for creating lower cost service, privatization of refuse disposal may allow San Diego to evade its current inability to collect fees for the cost of its collection service. Unfortunately, a repeal or amendment of the 1919 ordinance requires a vote of the people.

In a sense, local government has practiced privatization for a long time. Examples include the common practice of trash collection performed by private firms, utility services by investor-owned energy and water companies, and security for public buildings and facilities by private patrol services. Consideration may someday be given to private construction and operation of buildings or facilities to be jointly used by government and the private sector. The U.S. Navy is currently proposing such a development on waterfront property it owns in downtown San Diego.

c. *Utility User Tax.*

A tax on the use of utility service is another possible revenue-raising technique. Utility user's taxes may be imposed on the consumption of electricity, gas, cable and telephone services, including long distance telephone services. Charter cities may enact taxes on the use of utility services without conflicting with state law.¹³³ The utility users tax

132. SAN DIEGO MUNICIPAL CODE § 66.0123.

133. *Riviera v. City of Fresno*, 6 Cal. 3d 132, 490 P.2d 793, 98 Cal. Rptr. 281 (1971). The State Sales and Use Tax is set out in CAL. REV. & TAX CODE §§ 6001-7176 (Deering 1975). The Bradley-Burns Uniform Local Sales and Use Tax Law is found in CAL. REV. & TAX CODE §§ 7200-7209 (Deering 1975).

must be aimed at the utility user, rather than the utility supplier. However, the city can compel the utility supplier to collect the tax.¹³⁴

A utility user's tax was found not to be a "special tax" requiring two-thirds voter approval under Proposition 13.¹³⁵ Such a tax is allowed as long as the money obtained from the tax goes into the City's general fund and is not earmarked for specific uses.

More than eighty California cities impose utility user's taxes ranging from 1.5 percent to 11 percent. San Diego is not one of them. A flat rate utility users tax is inherently regressive because lower income households pay a tax which is a higher percentage of their income. Therefore, many cities provide exemptions or credits from utility user's taxes to low income households.

3. Financing Techniques Requiring Voter Approval.

a. *Fair Share Initiative.*

A statewide initiative is being proposed for the June 1990 ballot that would distribute a 10 percent share of state income tax revenues to all California cities and counties based on their percentage of the state's population. Adoption of the initiative would result in over \$80 million annually for San Diego based on its pro rata share. The San Diego City Council passed a resolution on July 10, 1989, which endorses the concept of the initiative. State revenues generally rise at a faster rate than inflation. It is believed that earmarking the state income tax generated in excess of the inflation rate for distribution to local governments will result in a phase-in period over four years.

Although the Fair Share initiative has merit, caution must be exercised if such action is pursued. There is the potential of action at the state level in the form of replacement taxes and fees which would result in an undesirable overall tax burden on local governments.

b. *General Obligation Bonds.*

General obligation bonds are defined as bonds backed by general tax revenues.¹³⁶ The financing is secured by an ad valorem tax rate on real property and can be used for most types of public facility projects and land acquisition. Generally considered the least risky form of state or

134. *City of Modesto v. Modesto Irrigation Dist.*, 34 Cal. App. 3d 504, 110 Cal. Rptr. 111 (1973).

135. *Felton v. City of Delano*, 162 Cal. App. 3d 400, 208 Cal. Rptr. 486 (1984).

136. BLACK'S LAW DICTIONARY 162 (5th ed. 1979).

local debt obligation, the borrowing price to the government is reduced. Exemption of interest paid on the bonds from federal income tax on the bondholder has also helped to keep financing cost down. In the past, interest rates for general obligation bonds have been as much as one percent lower than other forms of financing. In addition, the requirements for funded interest during the construction or acquisition period and for a debt service reserve are eliminated.

Proposition 46, passed by the voters in June 1986, allows local governments to levy property taxes above the one percent limit imposed by Proposition 13 to pay debt service on bonds which have received the necessary two-thirds voter approval. The political disadvantages of general obligation bond financing include the requirement of a two-thirds majority for approval of an issue and the negative impact of debt service on property taxes.

c. *Gann Waiver*

As discussed previously,¹³⁷ voters may approve a temporary waiver of the Gann Limit, limited to four years. This waiver does not provide additional revenues to the local government or allow financing of additional services; it only allows the local government to maintain current levels of service. In San Diego, the current Gann waiver expires on June 30, 1991. It is currently expected that the City of San Diego will receive between \$250 and \$450 million in tax revenues above its Gann Limit over the four fiscal years 1992 through 1995. Therefore, part of the City's long-term financing plan includes having another Gann Waiver placed on the ballot.

d. *Senate Constitutional Amendment 1 (SCA 1).*

As discussed previously, there will be a proposed constitutional amendment on the June 1990 ballot. Commonly called SCA 1, the Amendment will liberalize the annual adjustment to the Gann limit to reflect the rate of economic growth more accurately. Instead of being tied to the Consumer Price Index, the change in cost of living will be measured by the change in California per capita personal income, which has been growing faster than the CPI.

C. *Citizen Response*

At the time of this writing, two citizen groups have filed their inten-

137. See *supra* Part II.B.

tions to circulate petitions to collect signatures for growth management initiatives. Implicit in this action is the perception by some segments of the community that the current growth management policies are not working effectively and that the likelihood of a City Council orchestrated solution is slim. Both proposals emphasize the need for (1) identifying effective financing methods for necessary public improvements and (2) construction timing which provides completed facilities at the time they are needed.

Despite the similarity in goals, the two citizen proposals are very different in their methodology. The Planned Growth Initiative requires that all applications for discretionary permits submit detailed traffic congestion and fiscal balance analyses and certify that adequate public facilities shall be available prior to or concurrent with need. Traffic standards and public facility levels of service are the driving forces in this citizens' measure. Mitigation measures in the Planned Growth Initiative include construction of public improvements, changes in density, phasing and scheduling plans; but emphasis seems placed on the contribution of fees in an amount sufficient to pay for the applicant's proportionate share of any required mitigation measures.

The second initiative, called San Diego City Traffic Control and Comprehensive Growth Management Initiative (San Diego 2000), focuses on traffic control through the completion of the regional transportation system. This goal is accomplished through the imposition on new development of a comprehensive transportation impact fee and mandatory transportation demand management program. Specific improvements are identified in the measure as well as a fee cap of \$200 per average daily trip.

The preparation and circulation of these two initiative measures indicates a citizen attempt to help conclude the process of reevaluating the City's growth management policies. The Progress Guide and General Plan review commenced in January 1987 was never fully completed. While policy direction was given by the City Council following the defeat of Propositions H and J in November 1988, the comprehensive review called for in early 1987 was never finished. Some citizens fear that tough fiscal times will direct Council attention to issues of basic City services rather than to the job of defining service levels, identifying funding sources and establishing timing of construction for public facilities needed for new development. Permitting growth to proceed without tackling these basic issues could jeopardize San Diego's quality of life.

VI. CONCLUSION

San Diego enters the 1990s with legislative and electoral policy decisions made in the late 1980s supporting continuing growth and development of the community. At the same time, however, the City is strongly committed to assuring that all aspects of the quality of life remains high. The focus is appropriately upon facilities, their level of service, time of construction and, most importantly, funding sources. The City has analyzed the range of financial approaches available and has decided to use several techniques as the first methods to be implemented in San Diego.

However, a significant political question remains: Why is all this necessary? The agony and ecstasy of the search for and discovery of adequate means to finance the public facilities and services needed by growing California communities could have been avoided altogether through establishment of a coordinated, comprehensive, fair tax policy by the California Legislature and Congress. Lacking that, the electorate took it upon itself to resolve perceived inequities in a piecemeal fashion. Without meaningful tax reform, local government financing troubles will persist throughout the last decade of the 20th Century and beyond.

NOTES

